

property rights.<sup>50</sup> But different concerns independent of property interests may give rise to a right to vote; for example, courts have recognized that citizens must have an equal voice in the affairs of their local schools.<sup>51</sup> Courts testing the validity of extraterritorial exercises of power unaccompanied by the franchise should ask whether any of the specific powers exercised involve direct and significant encroachment upon private rights.

When this approach is applied to Alabama's system of extraterritorial government, the grant of criminal jurisdiction to the municipal courts is seen to be particularly troublesome. Tuscaloosa has the authority to enforce all of its ordinances — including one adopting all state misdemeanors<sup>52</sup> — in its police jurisdiction.<sup>53</sup> While this authority falls far short of that exerted in maintaining a comprehensive criminal code, its exercise can profoundly affect private rights. It may be true that the extraterritorial effect of the ordinances of some Alabama cities amounts to no more than benign traffic regulation. But the right of citizens to vote should be determined by reference to the most intrusive, rather than the least intrusive, exercises of power over them.

By resting its analysis on the legitimacy of residency lines, the Supreme Court avoided announcing firm principles for determining what exercises of extraterritorial municipal powers must be strictly scrutinized if not accompanied by the franchise. Until it articulates such principles, basing them on the significance of the specific powers exercised, the danger remains that municipalities will fail to derive their just powers from the consent of the governed.

#### *D. Freedom of Speech, Press, and Association*

*Discovery from Media Defendants in Public Figure Defamation Actions.* — In *New York Times Co. v. Sullivan*<sup>1</sup> and

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<sup>50</sup> The Court did not, however, question Alabama's authorization of extraterritorial licensing of businesses, a power that may have a dramatic impact upon property.

<sup>51</sup> See *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Locklear v. North Carolina State Bd. of Elections*, 514 F.2d 1152 (4th Cir. 1975). Justice Stevens pointed out that Tuscaloosa does not control the operation of Holt's schools. 439 U.S. at 77.

<sup>52</sup> TUSCALOOSA, ALA., CODE § 23-1 (1962 & Supp. 1975), cited in 439 U.S. at 82 n.10 (Brennan, J., dissenting).

<sup>53</sup> ALA. CODE § 12-14-1(b) (1975).

<sup>1</sup> 376 U.S. 254 (1964).

its progeny,<sup>2</sup> the Supreme Court established that a public figure cannot prevail in a defamation action unless he proves with "convincing clarity"<sup>3</sup> that the defendant published a defamatory falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>4</sup> Last Term, in *Herbert v. Lando*,<sup>5</sup> the Court held that the first amendment does not bar a public figure defamation plaintiff's direct inquiries during discovery into the states of mind or editorial communications of media defendants.

In February, 1973, the CBS documentary program "Sixty Minutes" carried a segment titled "The Selling of Colonel Herbert," narrated by Mike Wallace and produced and directed by Barry Lando. Lieutenant Colonel Anthony Herbert, a war hero suddenly relieved of his battalion command in Vietnam, had publicly accused his superior officers of covering up American atrocities.<sup>6</sup> The CBS broadcast juxtaposed filmclips of Wallace's interviews with Herbert and his detractors in a manner which cast doubts on Herbert's accusations.<sup>7</sup>

Herbert sued Lando, Wallace, and CBS<sup>8</sup> in a federal diversity action, demanding over forty-four million dollars in damages for injury to his reputation and impairment of his autobiography as a literary property.<sup>9</sup> During extensive pre-trial discovery, Herbert deposed Lando for more than a year, during which time Lando complied with nearly all discovery requests.<sup>10</sup> However, Lando refused to answer particular questions about his "conclusions, opinions, intentions, or conversations concerning people or leads to be pursued, the veracity of persons interviewed, and [his] reasons for the inclusion or exclusion of certain material."<sup>11</sup> Finding the information sought both relevant to the subject matter of the action and not privileged by the first amendment,<sup>12</sup> the district

<sup>2</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

<sup>3</sup> 376 U.S. at 285-86; *accord*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971) ("clear and convincing proof").

<sup>4</sup> 376 U.S. at 280. *See generally* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

<sup>5</sup> 99 S. Ct. 1635 (1979).

<sup>6</sup> *See Herbert v. Lando*, 568 F.2d 974, 980-82 (2d Cir. 1977).

<sup>7</sup> *Id.* at 982.

<sup>8</sup> Herbert also sued *Atlantic Monthly*, which published Lando's post-broadcast account of the Colonel's "decanonization." *See Lando, The Herbert Affair*, ATLANTIC MONTHLY, May, 1973, at 73.

<sup>9</sup> *See Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 995 (Oakes, J., concurring).

<sup>12</sup> *Herbert v. Lando*, 73 F.R.D. 387, 394-95 (S.D.N.Y. 1977).

court concluded that the information fell within the broad scope of discovery permitted by the federal rules of civil procedure.<sup>13</sup> The district judge therefore granted Herbert's motion to compel discovery.<sup>14</sup> On interlocutory appeal,<sup>15</sup> a divided Second Circuit panel remanded, holding that Lando had an absolute first amendment privilege not to answer questions concerning the "editorial process" underlying the broadcast.<sup>16</sup> The Supreme Court reversed.

Writing for the six-man majority,<sup>17</sup> Justice White maintained that the *Sullivan* "actual malice" standard<sup>18</sup> adequately balanced a libel plaintiff's reputational interests against the first amendment's guarantee of a free press.<sup>19</sup> The first amendment did not, therefore, additionally require a plaintiff to forfeit discovery of evidence critical to proving his claim. Indeed, by making it "essential to proving liability that plaintiffs focus on the conduct and state of mind of the defendant,"<sup>20</sup> *Sullivan* and its offspring accentuated a public figure plaintiff's

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<sup>13</sup> *Id.*; see FED. R. CIV. P. 26(b)(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

<sup>14</sup> 73 F.R.D. at 406; see FED. R. CIV. P. 37(a)(2).

<sup>15</sup> See 28 U.S.C. § 1292(b) (1976).

<sup>16</sup> *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977). Chief Judge Kaufman and Judge Oakes, in separate but overlapping opinions, found constitutional protection for the editorial process in the Supreme Court's recent decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a statute requiring newspapers to grant right of reply to political candidates), and *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (no first amendment violation when broadcaster refuses to accept paid political advertising). Judge Oakes derived additional support for the absolute privilege from "the Supreme Court's evolving recognition of the special status of the press in our governmental system." 568 F.2d at 986. *But cf.* Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225 (recent Supreme Court press cases consistently hold that first amendment affords no privileges to institutional press beyond those available to public at large).

<sup>17</sup> Justice Powell wrote a concurring opinion while Justices Stewart and Marshall filed separate dissenting opinions. Justice Brennan dissented in part.

<sup>18</sup> "Actual malice," defined by *Sullivan* as defendant's knowledge of the falsity, or reckless disregard of the truth or falsity, of his publication, 376 U.S. at 280, is distinct from "common law malice" — defendant's ill will, spite, or hostility — which a pre-*Sullivan* libel plaintiff had to prove to enhance damages or to defeat defendant's assertion of a conditional privilege. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 794-95 (4th ed. 1971). Because Justice Stewart believed that most of Herbert's questions would uncover only evidence of Lando's common law malice, he deemed them irrelevant to the issue of Lando's "actual malice." See 99 S. Ct. at 1661. See also note 40 *infra*.

<sup>19</sup> 99 S. Ct. 1638-50.

<sup>20</sup> *Id.* at 1641.

need for state of mind discovery. Justice White did not agree with the Second Circuit that *Miami Herald Publishing Co. v. Tornillo*<sup>21</sup> and *Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>22</sup> had entirely immunized a media defendant's editorial processes against an adversary's pretrial scrutiny;<sup>23</sup> in his view, those decisions held only that governments may not dictate in advance what the news media must or must not publish.<sup>24</sup>

Justice White contended that an editorial process privilege would alter the balance of interests struck in *Sullivan* by substantially interfering with a libel plaintiff's ability to carry his burden of proof.<sup>25</sup> He noted, furthermore, that the proposed privilege might shield from discovery not only Lando's beliefs about the veracity of his material, but any knowledge his personal research or communications with colleagues might have revealed about the material's truth or falsity.<sup>26</sup> The majority discounted the possibility that compelling disclosure of editors' conversations and reporters' beliefs would unconstitutionally chill editorial decisionmaking;<sup>27</sup> permitting discovery would discourage only "publication of erroneous information known to be false or probably false."<sup>28</sup> In the Court's opinion, the existence of *some* constitutional protection of editorial discussions from "casual inquiry"<sup>29</sup> did not justify recognition of an absolute privilege when the opposing party has "a demonstrated specific need for evidence."<sup>30</sup> The majority was convinced that trial judges applying existing discovery provisions already have "ample powers" to curb discovery abuse by requiring relevance,<sup>31</sup> by issuing protective orders,<sup>32</sup> and by construing the rules to secure speedy and inexpensive determinations of defamation actions.<sup>33</sup>

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<sup>21</sup> 418 U.S. 241 (1974).

<sup>22</sup> 412 U.S. 94 (1973).

<sup>23</sup> 99 S. Ct. at 1643-45. See also note 16 *supra*.

<sup>24</sup> 99 S. Ct. at 1645.

<sup>25</sup> *Id.* at 1646.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1646-47.

<sup>28</sup> *Id.* Justice White posited that exposing editorial discussion to discovery would not dampen frank exchanges of fact and opinion in the newsroom. In fact, he contended that the ever-present threat of liability for knowing or reckless error would provide journalists with incentive to maintain error-avoiding procedures. *Id.* at 1648. But see p. 158 *infra*.

<sup>29</sup> 99 S. Ct. at 1648. The majority expressly noted that a "law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest" would not survive first amendment scrutiny. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See FED. R. CIV. P. 26(b)(1); note 13 *supra*.

<sup>32</sup> See FED. R. CIV. P. 26(c).

<sup>33</sup> See FED. R. CIV. P. 1.

The other Justices were, however, far less sanguine that judicial application of existing rules could sufficiently limit discovery abuse. In a concurring opinion strongly reminiscent of his earlier special concurrences in press cases,<sup>34</sup> Justice Powell urged judges making discovery rulings to consider first amendment interests when balancing the rights of the plaintiff and the press.<sup>35</sup> Justice Brennan, dissenting in part, sided with the majority in rejecting a privilege shielding reporters' mental processes from examination,<sup>36</sup> but considered a qualified constitutional privilege necessary to protect editors' "pre-decisional communications."<sup>37</sup> Justice Marshall, dissenting, also conceded that a journalist's state of mind should be discoverable.<sup>38</sup> He cautioned, however, that libel actions are particularly fertile ground for discovery abuse,<sup>39</sup> and therefore argued for an absolute privilege altogether foreclosing discovery of "the substance of editorial conversation."<sup>40</sup>

In *Herbert*, the Justices confronted an issue poised at the confluence of three legal doctrines: the common law tort of defamation, the first amendment, and the liberal philosophy of civil discovery.<sup>41</sup> At the outset, however, the majority asserted that the *Sullivan* standard had already forged the ultimate accommodation between the first amendment and a public figure's reputational interests. In effect, the Court reduced its inquiry to whether, in light of a public figure plaintiff's heavy burden of proof, a media defendant's editorial process should be immunized from discovery. Rather than treating that issue as one of first impression,<sup>42</sup> the majority then erroneously concluded that constitutional and common law precedent had already considered and rejected an editorial process privilege.<sup>43</sup> Had the Court acknowledged that prior

<sup>34</sup> See *Zurcher v. Stanford Daily*, 436 U.S. 547, 568 (1978) (Powell, J., concurring); *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring). See also note 45 *infra*.

<sup>35</sup> 99 S. Ct. at 1650-51 (Powell, J., concurring).

<sup>36</sup> *Id.* at 1657 (Brennan, J., dissenting in part).

<sup>37</sup> *Id.* at 1651.

<sup>38</sup> *Id.* at 1665-66 (Marshall, J., dissenting).

<sup>39</sup> *Id.* at 1664.

<sup>40</sup> *Id.* at 1666. Only Justice Stewart, dissenting, did not evaluate whether the information sought should have been privileged. See note 18 *supra*.

<sup>41</sup> Although the Second Circuit apparently intended its editorial process privilege to extend beyond pretrial discovery to trial itself, see *Herbert v. Lando*, 568 F.2d 974, 995 n.38 (2d Cir. 1977) (Oakes, J., concurring), each of the Supreme Court opinions analyzed the need for the proposed privilege solely within the context of discovery.

<sup>42</sup> The district court judge had assumed that the case raised a question of first impression. See *Herbert v. Lando*, 73 F.R.D. 387, 390 (S.D.N.Y. 1977); cf. 99 S. Ct. at 1652 (Brennan, J., dissenting in part) ("a novel and difficult question of law").

<sup>43</sup> See 99 S. Ct. at 1641-45 & nn.6-15. None of the cases cited by the majority expressly disproved the existence of an editorial process privilege. The pre-*Sullivan*

decisions did not foreclose the existence of an editorial privilege, it would have been obliged to decide whether judicial authorization of discovery into the editorial process unduly burdens the first amendment values that *Sullivan* sought to protect. The majority's misreading of precedent led it instead to insist that Lando present a "clear and convincing" case in favor of such a privilege.<sup>44</sup> Once the issue had been framed in this way, Lando's failure to persuade a majority to adopt his position was hardly surprising, given the Court's recent decisions uniformly rejecting special privileges for the press.<sup>45</sup>

A further weakness in the majority's analysis lay in its failure even to attempt a definition of the concept of "editorial process." Despite its acknowledgment that editorial process deserves *some* first amendment protection from casual in-

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cases demonstrated only that state of mind evidence is admissible to prove the defendant's common law malice, *see* note 18 *supra*. Similarly, since the libel defendant introduced evidence of his own state of mind in many of the post-*Sullivan* cases, *see* 99 S. Ct. at 1647 n.21, those cases merely affirmed the relevance and admissibility of evidence of the editorial process in defamation cases. Thus, the precedent cited by the majority suggested only that such a privilege, if it exists, may be voluntarily waived. *Cf. Note, Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979) (admissibility or relevance of criminal defendant's testimony does not invalidate his constitutional privilege against self-incrimination).

<sup>44</sup> 99 S. Ct. at 1646.

<sup>45</sup> *See, e.g.,* Houchins v. KQED, Inc., 438 U.S. 1 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972). *See generally* Blanchard, *supra* note 16.

Indeed, Justice White's analysis in *Herbert* repeatedly echoed his earlier opinions for nearly identical majorities in two criminal discovery cases: *Branzburg v. Hayes*, 408 U.S. 665 (1972) (denying newsmen special testimonial privilege to withhold information about confidential sources from grand jury), and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (denying newsrooms special protection from searches under properly drawn warrants). Although in each of the three cases the majority recognized *some* first amendment protection of the press' right to acquire, process, or disseminate news, *compare* p. 152 *supra* with *Zurcher v. Stanford Daily*, 436 U.S. at 566 and *Branzburg v. Hayes*, 408 U.S. at 707, the Court invariably rejected any argument that such protection derived from the free press clause's independent recognition of special status for the press, *compare* *Zurcher v. Stanford Daily*, 436 U.S. at 565 with *Branzburg v. Hayes*, 408 U.S. at 684. In each case, the majority asserted that the status quo properly balanced the litigants' need for evidence against the press' first amendment interests, and thus refused to adopt additional procedural or substantive safeguards to counteract any incremental chilling effect resulting from discovery. *Compare* pp. 151-52 *supra* with *Zurcher v. Stanford Daily*, 436 U.S. at 559, 566 and *Branzburg v. Hayes*, 408 U.S. at 688, 693-94. The majority instead assumed that a judge or magistrate could protect first amendment interests through strict administration of existing discovery rules. *Compare* p. 152 *supra* with *Zurcher v. Stanford Daily*, 436 U.S. at 567 and *Branzburg v. Hayes*, 408 U.S. at 708. Each time, however, Justice Powell filed a concurring opinion urging the judge or magistrate to heed first amendment values when enforcing those provisions. *See* note 34 *supra*.

quiry,<sup>46</sup> the majority rejected Lando's claim in part because it considered the outlines of the editorial process too malleable to permit confinement of a privilege protecting that process.<sup>47</sup> Had the Court sought primarily to safeguard first amendment interests, however, it could have recognized constitutional protection for the heart of the editorial process — for example, a reporter's work product<sup>48</sup> as well as oral and written communications with his editor — without detailing the contours of the concept. Indeed, if the Court had taken as a starting point its own tentative definitions of an editor's functions from *Columbia Broadcasting System, Inc. v. Democratic National Committee*<sup>49</sup> and *Miami Herald Publishing Co. v. Tornillo*,<sup>50</sup> it could then have directed lower courts to delineate the precise boundaries of those functions on a case-by-case basis.

The Court's unwillingness to follow that course suggests that its result rested primarily on a conviction that discovery of the editorial process would not chill publication of truthful information. In fact, the Court's assumption that the "actual malice" standard sufficiently protects first amendment interests underestimated the potential chilling effect of editorial process discovery. The *Herbert* majority thus failed to heed the admonition of the *Sullivan* Court that "fear of the expense" of defending defamation suits also spurs self-censorship.<sup>51</sup> Be-

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<sup>46</sup> See p. 152 & note 29 *supra*.

<sup>47</sup> See p. 152 *supra*.

<sup>48</sup> The Court could have extended a qualified immunity from disclosure to the "work product" of newsmen preparing stories for publication, analogous to the protection granted to the "interviews, statements, memoranda, correspondence, . . . mental impressions, [and] personal beliefs" of attorneys preparing for trial in *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). See FED. R. CIV. P. 26(b)(3). For one attempt to define such an immunity, see Comment, *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119 (1970). However, Lando's decision to turn over voluntarily most of his reporter's notes, drafts, interview transcripts, and videotapes may have contributed to the Court's reluctance to grant even a qualified immunity to his work product. See *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977) (Kaufman, J.) (describing extent of Lando's production).

<sup>49</sup> 412 U.S. 94, 124 (1973): "For better or worse, editing is what editors are for; and editing is selection and choice of material."

<sup>50</sup> 418 U.S. 241, 258 (1974) (emphasis added) (footnote omitted):

A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size, and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control.

<sup>51</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (emphasis added). See also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) ("The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause [self-censorship].").

cause the *Sullivan* rule operates only at trial, well after a media defendant has incurred sizable litigation expenses,<sup>52</sup> it only partially mitigates self-censorship. Many lower courts have therefore resorted to summary judgment on the issue of actual malice in order to give the *Sullivan* rule prophylactic effect earlier in the litigation.<sup>53</sup> Summary judgment has thus served as a procedural device to discourage press self-censorship by reducing the costs of defending libel actions.<sup>54</sup>

*Herbert's* authorization of direct inquiry into the editorial process appears likely, however, to increase libel defense costs in three ways. First, *Herbert*, *Hutchinson v. Proxmire*,<sup>55</sup> and *Wolston v. Reader's Digest Association, Inc.*<sup>56</sup> — all decided last Term in favor of defamation plaintiffs<sup>57</sup> — may foster a perception that the odds of recovery in a defamation action have improved, and thus increase the number of suits brought by both public and private figures.<sup>58</sup> Second, the Court's explicit recognition that direct state of mind discovery is crucial in public figure defamation suits<sup>59</sup> may deter trial courts from

<sup>52</sup> "The basic *Times* rule merely changes the instructions under which the case is submitted to the jury; by the time the litigation reaches that point, a major portion of the defense costs have been incurred." Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 436 (1975).

<sup>53</sup> See, e.g., *Treutler v. Meredith Corp.*, 455 F.2d 255, 257 (8th Cir. 1972); *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970); *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) ("Summary judgment is the 'rule,' and not the exception, in defamation cases."), aff'd mem., 538 F.2d 309 (2d Cir. 1976).

<sup>54</sup> See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2730, at 592 (1973).

<sup>55</sup> 99 S. Ct. 2675 (1979).

<sup>56</sup> 99 S. Ct. 2701 (1979).

<sup>57</sup> In *Proxmire* and *Wolston*, decided on the same day, the Court reversed two lower court grants of summary judgment in libel actions on the grounds that neither plaintiff had "voluntarily thrust himself or his views into public controversy" to the extent necessary to be deemed a public figure under the standard of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). See p. 164 & note 20 *infra*. As private individuals, *Hutchinson* and *Wolston* need prove only some element of fault as defined by state defamation law, such as negligence, to recover. See *Eaton*, *supra* note 4, at 1408-47. The problem of defining a public figure never arose in *Herbert*, however, for Colonel *Herbert* conceded that he was a public figure. See 99 S. Ct. at 1639.

<sup>58</sup> *Herbert* may also inspire public figures to engage in more lengthy state of mind discovery simply because they recognize its value as a tactical weapon to force pretrial settlement or to harass media critics. See 99 S. Ct. at 1657 n.11 (Brennan, J., dissenting in part); *id.* at 1664 (Marshall, J., dissenting).

<sup>59</sup> Although the *Herbert* Court did not explicitly decide whether private figure libel plaintiffs also deserve state of mind discovery, the majority's language was broad enough to permit such discovery. See 99 S. Ct. at 1641. Since a private figure libel plaintiff carries a less onerous burden of proof than his public figure counterpart,



granting summary judgment to media defendants *before* that phase of discovery is completed. The price of state of mind discovery could thus become a fixed cost of defending libel actions. Third, to the extent that *Herbert* and *Proxmire* suggest the Court's disapproval of summary judgment on the issue of "actual malice,"<sup>60</sup> those decisions may well dissuade trial judges from summarily disposing of defamation actions even after pretrial discovery is completed.<sup>61</sup> Even media defendants with meritorious defenses may thus incur the costs of full-fledged trials and may risk exposure to adverse verdicts by unpredictable juries.<sup>62</sup> While Justice White has frequently intimated his belief that the threat of libel suits will not compel well-financed media conglomerates to censor themselves,<sup>63</sup> the chilling effect of his majority opinion is likely to fall most heavily on lower budget publications and independent broadcasters. *Herbert* can only intensify their need to ask not only if a proposed article or broadcast is truthful, but "whether its publication will result in a lawsuit, and if so, what the cost of successfully defending a suit will be."<sup>64</sup>

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however, *see* note 57 *supra*, it is not clear that the logic of *Herbert* also compels trial judges to condone such discovery. Even private figures who attempt to prove "actual malice" in order to reap punitive damages have only a weak claim to state of mind discovery since they may recover full compensation for their injury without such a showing. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

<sup>60</sup> In a footnote to *Proxmire*, Chief Justice Burger noted that "[t]he proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 99 S. Ct. 2675, 2680 n.9 (1979) (citing *Herbert*). This observation is dictum, however, since the Court expressly did not decide whether the lower court had properly disposed of the case by summary judgment. *Id.*

<sup>61</sup> Following *Herbert*, one court has held that a public figure libel plaintiff "need only present evidence which shows a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity" to defeat a media defendant's motion for summary judgment on the "actual malice" issue. *See Nader v. De Toledano*, 48 U.S.L.W. 2146 (D.C. Ct. App. July 31, 1979).

<sup>62</sup> As early as *Sullivan*, members of the Court expressed their doubts about the ability of juries to decide defamation cases without bias. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring in the result); *id.* at 295 (Black and Douglas, JJ., concurring). As a precaution, the *Sullivan* Court authorized appellate courts to review all factual evidence presented to juries in defamation cases in order independently to evaluate the plaintiffs' "actual malice." 376 U.S. at 284-85.

<sup>63</sup> *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 390-91 (1974) (White, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972) (White, J.); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 60 (1971) (White, J., concurring in the judgment). *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 796-800 (Burger, C.J., concurring).

<sup>64</sup> Anderson, *supra* note 52, at 438. In 1975, Professor Anderson estimated that "[t]he cost of defending a full-fledged libel suit probably begins at about \$20,000 and can run much higher." *Id.* at 435-36 (footnote omitted). Lando's costs in the discov-

Furthermore, direct inquiry into editorial communications may impede the accurate reporting of news by dampening the frequency and frankness of newsroom exchanges. Professor Blasi's empirical study of journalists' responses to the threat of subpoena revealed that fear of discovery most adversely affects reporters "who check and cross-check their information with numerous sources . . . and who keep extensive files and tapes for future verification reference and for trend stories."<sup>65</sup> The same editorial discussion which may lead a reporter to undertake fresh research — for example, an editor expressing doubts about a source's veracity — would provide damaging evidence if discovered and introduced in a libel suit.<sup>66</sup> Fear of editorial conversation discovery may deter reporters from recording recollections or confiding doubts to colleagues, and thus hinder effective news reporting.

Unregulated "editorial process" discovery thus appears likely to chill the dissemination of truthful as well as erroneous information. Nevertheless, the majority's failure to seek a "less restrictive alternative" to total repudiation of the Second Circuit's absolute privilege demonstrated the Court's unwillingness to recognize or reduce that chill.<sup>67</sup> Both majority and dissent correctly noted that a privilege against direct state of mind questions is superfluous, not because journalists' states of mind lack constitutional protection, but because their actual thoughts cannot be chilled.<sup>68</sup> Since threats of discovery can, however, chill a reporter's decision to *express* those thoughts, the majority should have searched for a solution less likely to expose to routine discovery a reporter's work product as well as his written and oral communications with fellow newsmen.<sup>69</sup>

Each of *Herbert*'s five opinions evidences the Justices' common concern that unchecked discovery has contributed to har-

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ery phase of *Herbert*, stretching over 26 deposition sessions, have undoubtedly exceeded that figure already. See *Herbert v. Lando*, 568 F.2d 974, 982 (2d Cir. 1977). See also p. 150 *supra*.

<sup>65</sup> Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 271 (1971).

<sup>66</sup> See 99 S. Ct. at 1659 (Brennan, J., dissenting in part).

<sup>67</sup> The Court has frequently employed "less restrictive alternative" analysis in first amendment cases. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

<sup>68</sup> None of the nine Justices argued in favor of a privilege protecting the individual journalist's state of mind. See, e.g., 99 S. Ct. at 1647 (White, J.); *id.* at 1657 (Brennan, J., dissenting in part); *id.* at 1665-66 (Marshall, J., dissenting).

<sup>69</sup> See note 48 *supra*.

assessment of parties, protracted depositions, and "mushrooming litigation costs."<sup>70</sup> Ironically, they also mirror the Justices' marked disagreement over district judges' ability to protect first amendment interests adequately through existing discovery rules. Though each Justice contemplated that judges would closely superintend discovery in libel cases, the Justices diverged about the need for a new rule of law to supplement current discovery provisions. Justice White's majority opinion simply invited the trial judge to administer existing discovery provisions stringently.<sup>71</sup> Yet a solution merely instructing the judge to reject "casual" discovery requests on grounds of lack of relevance or undue burden fails to indicate when first amendment values are at stake.<sup>72</sup> Similarly, Justice Powell's suggestion that first amendment values be "weighed carefully"<sup>73</sup> in no way indicates to the trial judge how much weight to accord those interests.

Only Justice Brennan, the author of *Sullivan*, called for judicial intervention to administer a *qualified* rule granting editors' and reporters' "[i]deas expressed in conversations, memoranda, handwritten notes and the like" presumptive protection against discovery.<sup>74</sup> Justice Brennan's standard would oblige the public figure plaintiff to establish, to the trial judge's satisfaction, a *prima facie* case that the defamatory publication was false.<sup>75</sup> That *prima facie* showing would substantiate the plaintiff's claim of injury and verify his specific need for evi-

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<sup>70</sup> 99 S. Ct. at 1649 (White, J.). See also *id.* at 1650 (Powell, J., concurring); *id.* at 1657 & n.11 (Brennan, J., dissenting in part); *id.* at 1662 (Stewart, J., dissenting); *id.* at 1664 (Marshall, J., dissenting).

<sup>71</sup> See p. 152 *supra*.

<sup>72</sup> Justice Stewart's dissenting opinion, in effect applying Justice White's solution, illustrates that judges may sharply differ when deciding whether certain questions are strictly relevant to the issue of "actual malice." See note 18 *supra*.

<sup>73</sup> 99 S. Ct. at 1651. See p. 153 *supra*.

<sup>74</sup> 99 S. Ct. at 1658 (quoting *Herbert v. Lando*, 568 F.2d 974, 993 (2d Cir. 1977) (Oakes, J., concurring)). Justice Marshall, by contrast, argued for an absolute rule of privilege for editorial conversations, which would have eliminated judicial discretion to allow discovery even when the plaintiff's need is particularly great. When certain information is available only from reporters, however, absolutely shielding it from discovery would effectively bar libel plaintiffs from carrying their burden of proof. Cf. *Garland v. Torre*, 259 F.2d 545 (2d Cir.) (reporter denied absolute privilege against disclosure of confidential sources in libel action), *cert. denied*, 358 U.S. 910 (1958).

<sup>75</sup> 99 S. Ct. at 1651, 1660. To demonstrate *prima facie* falsehood, the plaintiff would have to make a showing sufficient to resist summary judgment on the issue of falsity. For example, the trial judge could require the plaintiff to buttress his motion to compel discovery with affidavits from competent witnesses swearing that the defendant's publication was false.

dence of the journalist's state of mind. Only then would intrusion into the editorial process be justified.<sup>76</sup>

Although the *Herbert* majority did not accept Justice Brennan's compromise,<sup>77</sup> the spirit of the Brennan proposal may still offer guidance to trial judges confronted with requests for discovery into the editorial process. Adoption of the "qualified privilege" would merely have mandated a discovery schedule granting media defendants the opportunity to move for summary judgment early in libel litigation against plaintiffs who could not produce sufficient factual evidence of falsity. After *Herbert*, judges retain the option in defamation suits to schedule discovery issue by issue, in order to alleviate the adverse impact on the press of totally unfettered editorial process discovery. In the hope of obtaining summary judgment before the onset of editorial process discovery, media defendants could ask judges at the pretrial conference<sup>78</sup> to postpone state of mind discovery until the very end of the pretrial period.<sup>79</sup> Judicial willingness to grant summary judgment when plaintiffs are unable to demonstrate falsity would reduce the chilling effect arising from press fears of extended and costly litigation. At the same time, individual journalists would have an incentive to ensure the accuracy of their stories in order to deflect inquiries probing their states of mind.<sup>80</sup>

Thus, even after *Herbert*, judges mindful of the first amendment may employ these procedural devices to screen out those plaintiffs intent upon using discovery as an in terrorem device to force settlements; the substantive *Sullivan* standard will then bar from recovery the remaining plaintiffs who can-

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<sup>76</sup> Justice Marshall criticized Justice Brennan's qualified privilege on the ground that the press would continue to be chilled so long as reporters were aware that their conversations might possibly be discovered. See 99 S. Ct. at 1666; *accord*, *Herbert v. Lando*, 568 F.2d 974, 994 (2d Cir. 1977) (Oakes, J., concurring). Professor Blasi's study suggested, however, that "[m]any newsmen . . . would be happy to accede to more qualifications and exceptions in the wording of a privilege if the probability were thereby increased that the Supreme Court would recognize the basic principle of a newsman's privilege." Blasi, *supra* note 65, at 283.

<sup>77</sup> Justice White dismissed Justice Brennan's suggestion as contemplating either a lengthy bifurcated trial or a formalistic verification of the pleadings. 99 S. Ct. at 1648 n.23. In fact, Justice Brennan seems to have contemplated that the plaintiff would make a showing that need not satisfy the burden of proof at trial but which would exceed mere allegation. See note 75 *supra*.

<sup>78</sup> See FED. R. CIV. P. 16.

<sup>79</sup> Indeed, Justice Powell explicitly approved use of delayed discovery and summary judgment on issues other than actual malice when necessary to protect first amendment interests. See 99 S. Ct. at 1651 n.4. Since state of mind discovery would be most useful to a plaintiff only after he had established a factual foundation for disputing the defendant's claim of good faith publication, postponing that discovery would not unduly prejudice plaintiffs.

<sup>80</sup> Cf. p. 158 *supra* (discussing contrary effect of majority's solution).

not prove "actual malice." *Herbert's* rejection of an absolute editorial process privilege does not oblige trial judges to condone unjustified intrusions into editorial communications. Prudent use of discovery schedules and grants of summary judgment on the falsity issue will moderate the chilling effect lingering after *Herbert*, without upsetting the substantive balance between the rights of public figures and the press first struck in *Sullivan*.

### *E. Immunity Under Speech or Debate Clause*

*Legislator's Liability for Repeating Defamatory Statements Outside Halls of Congress.* — In 1972, in *Gravel v. United States*,<sup>1</sup> the Supreme Court held that the speech or debate clause of the Constitution<sup>2</sup> did not shield a United States Senator from answering grand jury questions about his arranging private publication of a subcommittee's hearing record. Last Term, in *Hutchinson v. Proxmire*,<sup>3</sup> the Court held that the speech or debate clause did not shield a Senator from liability for defamatory remarks originally made in the Senate<sup>4</sup> but repeated to the press and in newsletters to constituents.<sup>5</sup> Taken together, these cases indicate a retrenchment of the speech or debate privilege. The *Proxmire* decision in particular will inhibit vigorous public debate by legislators by opening them to private lawsuit for publicizing their criticisms of

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<sup>1</sup> 408 U.S. 606 (1972).

<sup>2</sup> The speech or debate clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6.

<sup>3</sup> 99 S. Ct. 2675 (1979).

<sup>4</sup> *Proxmire* was uncertain whether he actually delivered the speech on the floor or merely inserted it into the *Congressional Record*. The Court assumed, without deciding, that a speech printed in the *Record* carries the same immunity as though it had been delivered on the floor. *Id.* at 2678 n.3.

<sup>5</sup> In another case decided last Term, *United States v. Helstoski*, 99 S. Ct. 2432 (1979), the Court held that the speech or debate clause prohibits evidence of legislative acts from being introduced in a prosecution of a member of Congress. While the tone of the *Helstoski* opinion — reflecting "the central importance of the Clause for preventing intrusion by [the] executive and judiciary into the legislative sphere," *id.* at 2441 — differs markedly from that in *Proxmire*, the cases do not conflict. *Proxmire* seeks to define the scope of immunized "legislative acts." *Helstoski* assumes the existence of a "legislative act" and addresses the issue of whether evidence of such acts may be admitted in a criminal case. In fact, dictum in *Helstoski* supports *Proxmire's* narrow definition of a legislative act: "A promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a promise to introduce a bill is not a legislative act." 99 S. Ct. at 2440 (emphasis in original). For commentary on the issues reflected in *Helstoski*, see generally Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280 (1979).